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No. _____

UNITED STATES SUPREME COURT
_____ TERM 1985

ARMOUR & COMPANY,

Petitioner,

vs.

CURTIS HOLSEY, JACKIE L. DRAKEFORD,
JULIUS FRAZIER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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COMES NOW your Petitioner, Armour & Company, by and through counsel, pursuant to 28 U.S.C.A. § 1254, and petitions this Court for a Writ of Certiorari to review a decision of the Court of Appeals for the Fourth Circuit dealing with class certification and the proper procedure to be followed in a bifurcated Title VII class action suit.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in upholding the trial court's finding that the Title VII claims of plaintiffs and of intervenors Bennett, Hill and Harvey were meritorious at Stage I of the bifurcated trial, thus depriving defendant Armour of any opportunity to rebut these individual claims at Stage II?

2. Did the Court of Appeals err in unholding the trial court's class certification with respect to the following:

(A) Did the Court of Appeals err in affirming the trial court's class certification date, thus allowing intervenor Bennett, a temporary production employee, to represent a class of employees allegedly denied sales and supervisory positions?

(B) Did the Court of Appeals err in affirming the trial court's finding of sufficient numerosity for class treatment based not on the total number of openings during the relevant time period but rather on the number of black employees at the facility?

(C) Did the Court of Appeals err in affirming the trial court's finding that

plaintiffs' claims of harassment and retaliation were susceptible to class treatment?

Parties to this action: Armour & Company (Petitioner/Defendant); Curtis Holsey, Jackie L. Drakeford, Julius Frazier (Plaintiffs); Mynell Bennett, Linwood Edwards, Janie Hill, and Laura Harvey (Plaintiff-intervenors).

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On Petition for Writ of Certiorari from Holsey v. Armour & Co., No. C-C-77-57 (W.D.N.C. March 16, 1981), vacated and remanded, 683 F.2d 864 (4th Cir. 1982), as revised on remand, No. C-C-77-057-M (W.D.N.C. January 28, 1983), affirmed in part and reversed in part, 743 F.2d 199 (4th Cir. 1984), petition for rehearing denied, No. 83-1428 (4th Cir. October 15, 1984).

* *

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

This is a Petition for Writ of Certiorari seeking review of the judgment of the Court of Appeals for the Fourth Circuit entered September 13, 1984, and from that Court's denial of this Petitioner's Petition for Rehearing on October 15, 1984. This Petition is brought pursuant to 28 U.S.C.A. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation and application of 42 U.S.C. § 2000(e) et seq. (Title VII), 42 U.S.C. § 1981, and Rule 23 of the Federal Rules of Civil Procedure. Pertinent texts are set forth in the Appendix hereto.

STATEMENT OF THE CASE

On March 7, 1974, Curtis Holsey (Holsey), Jackie L. Drakeford (Drakeford) and Julius Frazier (Frazier) (plaintiffs) filed race discrimination charges with the EEOC against their employer, Armour & Company (Armour). On March 4, 1977, they instituted this action against Armour and the United Food and Commercial Workers International Union (Union), alleging that Armour and the Union had engaged in racially discriminatory employment practices affecting a broadly-defined class of individuals in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. (Title VII) and 42 U.S.C. § 1981. Shortly thereafter, the court allowed Mynell Bennett's motion to intervene; Bennett had filed a charge of discrimination with the EEOC on January 17, 1972. On May 1, 1979, the trial court conditionally certified an "across-the-board" class including all past

and present employees as well as all applicants for employment.

Armour, a major manufacturer of meat products, has operated a facility in Charlotte, North Carolina since 1958. By 1973 Armour's Charlotte facility had approximately 200 production employees. However, beginning in 1973 and continuing to the time of trial (April of 1980), economic conditions brought about major operational changes in the beef industry. One result of these changes was a severe reduction in employment at local facilities. The race discrimination claims brought against Armour in the case at bar arose in large part out of the displacement of workers occasioned by such operational changes. From January of 1973 until April of 1980, Armour's Charlotte facility did not hire a single production employee, and as of April of 1980, only 50 production employees were working at the Charlotte facility.

At trial, Holsey contended he was the victim of discrimination on permanent layoffs in September of 1974 and February of 1975; he did not contend that he was denied a supervisory, office, sales, or other position. Frazier alleged that he was discriminated against in a layoff in December, 1974. Drakeford contended that he was denied promotion to a foreman position, that he was constructively discharged, and that he was denied a job in the sales department. Bennett claimed that she was not called to work as a temporary replacement worker often enough to acquire seniority and was terminated. Janie Hill, who appeared as a non-party witness, testified that she did not acquire seniority as promptly as other probationary employees in the sausage department. Linwood Edwards, another non-party witness, testified that he was denied a supervisory position. Laura Harvey, also a non-party witness, testified that she was denied positions in sales, the

laboratory, the sausage department, and as switchboard operator. Another non-party witness also testified for plaintiffs during the course of the trial.

The claims against the Union were dismissed. On August 13, 1980, the trial court entered a Memorandum of Decision concluding that Armour had discriminated against the named plaintiffs. Important to the issues here presented, the trial court also held at that time that Armour had discriminated against three of the non-party witnesses, Edwards, Hill and Harvey. This same Memorandum of Decision directed plaintiffs' counsel to prepare proposed findings.

On November 13, 1980, plaintiffs filed their proposed findings, together with a motion for leave to intervene on behalf of these three witnesses. On February 9, 1981, almost one year after trial, the court allowed the motions to intervene and on that same date

entered an order adopting almost verbatim plaintiffs' proposed findings of fact and conclusions of law and judgment.

Armour gave notice of appeal, bringing forward numerous assignments of error with regard to the procedure used by the trial court in wholesalely adopting plaintiffs' proposed findings of facts and conclusions of law, and challenging the sufficiency of the evidence, the court's allocations of the various burdens of proof, class treatment of the harassment and retaliation claims, the court's finding of liability at Stage I with respect to the plaintiffs' three non-party witnesses, and the propriety of the class certification.

On appeal, the Court of Appeals for the Fourth Circuit vacated the judgment, on grounds that the trial court apparently misallocated the burden of proof by requiring Armour "to do more than 'articulate a legitimate, nondiscriminatory reason' for

their employment decisions." 683 F.2d at 866. In addition, the Court of Appeals criticized the trial court's wholesale adoption of plaintiffs' proposed findings of fact and conclusions of law. The case was remanded, with instructions to the trial court to reconsider its findings of fact and conclusions of law, and to clarify its allocation of evidentiary burdens in light of this Court's intervening decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). 683 F.2d at 866. In light of its broad remand, the Court of Appeals did not in the first appeal reach Armour's other contentions of error. Id. After conducting proceedings on remand, the district court entered an amended judgment, from which Armour again appealed.

The Court of Appeals affirmed in part, vacated in part, and remanded, holding that the class as defined on remand was still too broad, in its inclusion of "office and

management positions," and that the class should be amended to include "only promotions into sales and supervisory positions." The Court of Appeals also held that there was insufficient evidence of a pattern or practice of racial discrimination against outside applicants to include a class of same. Id. The Court went on to hold, however, that the trial court did not err in adjudicating individual claims at the first stage of the bifurcated trial, that there was sufficient numerosity for class treatment of promotion claims, and that plaintiffs' harassment and retaliation claims were susceptible of class treatment. Id. Armour's subsequent Petition for Rehearing was denied.

ARGUMENT

THE COURT OF APPEALS UPHELD AN ERRONEOUS APPLICATION OF THE LAW IN HOLDING THAT THE CLAIMS OF PLAINTIFFS AND INTERVENORS WERE MERITORIOUS AT STAGE I OF THE TRIAL, THUS DEPRIVING ARMOUR OF ANY OPPORTUNITY TO REBUT THESE INDIVIDUAL CLAIMS AT STAGE II.

As noted above, the Court of Appeals approved the trial court's making a conclusive determination of liability at Stage I, not only with respect to the named plaintiffs, but also with respect to witnesses who were not even parties to the action at the time of trial. This ruling, when read in light of the Fourth Circuit's decision in Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978), creates a "double standard" for Title VII plaintiffs and defendants.

In Sledge, the Court of Appeals for the Fourth Circuit discussed the bifurcated approach used in the trial of Title VII class actions, noting that the first part of the

trial is the liability stage, during which the plaintiffs attempt to establish that the employer engaged in a pattern or practice of illegal discrimination. If the plaintiffs succeed, a second stage of trial is held, at which time the individuals are required to establish that they are members of the class and have suffered an individual economic loss as a result of the employer's discrimination. Id. at 637. As the court recognized, at Stage II of the litigation,

> [t]he burden then shifts to the employer to demonstrate . . . that factors other than the condemned discrimination caused the decision of which the particular back pay claimant complains, e.g., that with respect to the unsuccessful applicant there were no job openings or at least none for which he was qualified, or that with respect to the employee assigned to undesirable work no better jobs were vacant or at least for which he was qualified.

Id., citing inter alia Teamsters v. United States, 431 U.S. 324 (1977), Franks v. Bowman Transportation Co., 424 U.S. 747, 770-773 (1976); Albemarle Paper Co. v. Moody, 422 U.S.

405, at 413-22, 425 (1975); and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

The question addressed by the Court in Sledge is analogous to that presented here, as the Court in Sledge considered whether the trial court could conclusively make a finding of no liability with respect to a named plaintiff at Stage I. As the Court in Sledge described the procedure there used, "the decision to bar the claims of the named plaintiffs was reached after trial on the issue of the legality of [defendant's] conduct, but prior to the second stage of the bifurcated proceedings which had been expressly reserved for the evaluation of request for individual relief." Id. at 637. The court in Sledge specifically noted that because Stage I may result in a finding that there was no pattern or practice of discrimination, it would be "unfair to penalize any claimant--whether a named

plaintiff or not--for failing to affirmatively prove in the first stage of the inquiry that which he was led to believe he would be expected to prove only in the later, yet-to-be-held back pay proceeding." Id. at 638. The court noted that just because named plaintiffs appear as witnesses during the trial's initial phase, they should not be subjected to a more rigorous burden of proof. Id. See also Teamsters, supra, 431 U.S. 324 at 342 n.24 ("individual proof concerning each class member's specific injury was appropriately left to proceedings to determine individual relief").

The Fourth Circuit Court of Appeals also discussed the bifurcated trial procedure in EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983). Said the court:

> [Plaintiffs'] argument would disregard the fact that the trial was bifurcated by agreement of the parties [as was the situation in the case at bar]. Accordingly, the first issue to be resolved in this case was that of liability for

> discrimination by the defendant. If liability were not found at this stage, the second stage, which would relate to establishing the individual claims of class members, such as these plaintiffs, would be mooted. However, specific evidence of individual acts of discrimination and promotion was relevant, but, under the practice in a bifurcated trial, it was not admitted to establish the class members' right to relief, but to provide support for the prima facie class claim of liability.

Id. at 674. (emphasis added)

If plaintiffs and others who testify need not conclusively establish their claims at Stage I, Armour logically and fairly should not be required to conclusively rebut individual claims until Stage II. It is respectfully submitted that the procedure which the Court of Appeals has approved for bifurcated trials through its decisions in Sledge and the present case has thrown out of balance the shifting burdens and responsibilities established by decisions of this Court including Aikens v. United States Postal Service Board of Governors, 460 U.S.

711, 31 F.E.P. Cases 609 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Teamsters v. United States, 431 U.S. 324 (1977); and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In the trial of an individual case, if the plaintiff establishes a prima facie case, the defendant must articulate a reasonable nondiscriminatory reason for its actions and finally the plaintiff may show pretext. In the trial of a bifurcated class action case, the issue of class discrimination follows the same pattern, i.e., plaintiff establishes a prima facie case of class discrimination, the defendant articulates a reasonable nondiscriminatory reason, and the plaintiff may show pretext. Under the Fourth Circuit's holdings, although an individual class member can conclusively prevail at Stage I, the

defendant employer cannot rebut an individual's claim at Stage I of the trial of a bifurcated class action case, giving the plaintiff or class member (but not the defendant) two opportunities to prove his case.

While Armour raises this issue as to both plaintiffs and intervenors, it is submitted that the Court of Appeals' holding is particularly inequitable as to intervenors Edwards, Hill, and Harvey. During the discovery process and the trial, the class in this action was defined as an across-the-board class covering all conceivable aspects of employment at Armour's Charlotte facility, including both employees and applicants. Armour could not have conducted discovery as to every potential class member's individual claims, even if these persons could somehow have been identified. Armour could not be prepared at Stage I of the trial to rebut claims of every potential class member. At

the trial non-party class members, including Edwards, Hill, and Harvey, testified. After the trial, but prior to any motion by these class members to intervene, the trial court filed its Memorandum of Decision conclusively finding that intervenors Edwards, Bennett, and Hill were individual victims of discrimination, leaving to Stage II only the computation of damages. The court's Memorandum of Decision is tantamount to a judgment in favor of a nonparty. It was not until six months after the Memorandum of Decision was filed that Edwards, Bennett, and Hill even moved to intervene. The fact that intervention was before entry of final judgment is of little significance in view of the Memorandum of Decision and the fact that, in accordance with Judge McMillan's standard procedure, it was plaintiffs' counsel who was directed to prepare the findings and judgment, which were subsequently adopted virtually verbatim.

That the above-described was the order of procedure ordered by the court is illustrated in the Order on Reference to a Master. Under the terms of this Order, the only issue at Stage II as to both the plaintiffs and intervenors is damages. With respect to other class members, the master is of course first to determine if the class member was denied a position because of race and then to make recommendations as to loss of income.

Although the specific question raised here has apparently not been addressed previously in any reported decisions, the procedure approved by the Fourth Circuit is clearly not in keeping with the bifurcated trial procedure used in the other circuits, is manifestly unfair to defendants in Title VII class action cases, and if allowed to stand would work an unwarranted burden on such defendants in an era in which this Court has worked to carefully delineate the proper use of class action procedure in the Title VII area.

THE COURT OF APPEALS INCORRECTLY UPHFLD THE TRIAL COURT'S CLASS CERTIFICATION.

(A) Plaintiff-Intervenor Bennett Cannot Serve As The Representative Of Employees Seeking Office, Sales And Foreman Positions.

As previously noted, the class in this case was originally certified as an "across the board" class including all present and future employees and applicants for employment at Armour's Charlotte facility. While this case was on appeal for the first time before the Fourth Circuit, this Court announced its decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 72 L. Ed.2d 740 (1982). On the initial remand, plaintiffs themselves put forward a suggested modification to the definition of the class, to limit the class to employees and applicants of Armour's Charlotte facility who were (1) "adversely affected . . . by the company's racially discriminatory employment practices

involving promotions or hiring into office and managerial positions, including sales and foreman positions" or employees who were allegedly subject to "retaliation for having opposed discriminatory practices or having exercised rights protected under Title VII." The class was so limited on remand. As approved by the Court of Appeals in the second appeal, the class was further limited to exclude all outside applicants and to include promotion claims only for sales and supervisory positions.

Armour submits that the class as presently constituted is nonetheless overly broad, in that the class includes individuals subjected to discriminatory treatment at any time since "July 27, 1971 (six months prior to Bennett's charge filed with the EEOC)." 743 F.2d at 213. In using Bennett's EEOC charge as the basis for the class certification date as to all claims, the Court allowed Bennett, a temporary production worker, to represent

employees aspiring to promotions in sales and supervisory positions.

The trial court found in the case at bar that Drakeford and Harvey were denied sales positions; that Drakeford and Edwards were denied supervisory positions; and that Holsey, Frazier, Drakeford, and Bennett were victims of retaliation. Drakeford alone fits into each of the distinct areas of class certification (i.e., sales, supervisors, and retaliation). The Court of Appeals in its decision in the second appeal stated that "at least one representative is a qualified member of the class of employees denied promotions in sales and supervisory positions and subjected to retaliation." 743 F.2d at 217. That one representative can only be Drakeford.

Armour respectfully submits that the Court of Appeals erred in basing the class certification date on Bennett's charge of discrimination. As previously noted, Bennett's charge was filed more than two years prior to

that of Drakeford, Holsey, and Frazier. With the exception of the original plaintiffs and Bennett, no other charges of discrimination existed. The class as certified allows Bennett to represent a class of employees allegedly denied sales and supervisory positions, a practice specifically disallowed by this Court.

It is obvious under Falcon that Bennett cannot represent a class of aspiring salespersons or supervisors. The evidence at trial was undisputed that Bennett worked as a temporary replacement worker in the sausage department from July of 1971 through January of 1972. During Bennett's employment of six months she worked only 45 1/2 days. After January of 1972, Bennett was never recalled to work. Bennett was never denied a supervisory or sales position. The Court of Appeals' allowance of Bennett as a class representative of the sales and supervisory class is clearly inconsistent with General Telephone Company of

the Southwest v. Falcon, 457 U.S. 147 (1982), and East Texas Motor Freight v. Rodriquez, 431 U.S. 395 (1977). In fact, Bennett's race is the only common denominator between herself and any class member seeking supervisory and sales positions.

Even assuming arguendo that Bennett's charge could be used as a basis for the class certification date, it can only be so used for a subclass of alleged victims of retaliation, thus creating two subclasses, one subclass for employees denied sales and supervisory positions, and the second subclass for employees allegedly victims of retaliation. The law is clear that each subclass must separately meet the requirements of Rule 23. See Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000 (9th Cir. 1981).

(B) The Lower Courts Erred In Their Approach To Determining Whether Rule 23's Numerosity Requirement Was Met.

Rule 23(a)(1) provides that "a member of a class" may sue on behalf of the class only if "the class is so numerous that joinder of all members is impracticable." While there is no automatic number for determination of numerosity, this Court in General Telephone Company of the Northwest, Inc. v. EEOC, 446 U.S. 318, 330 n.14 (1980), cited with approval cases holding as many as 35 to 45 individuals too few for class treatment. As noted by Schlei and Grossman, "[c]ourts have generally been reluctant to certify a class with fewer than 45 members". B. Schlei & P. Grossman, Employment Discrimination Law at 1242 (2d ed. 1983).

The numerosity requirement clearly has not been met in the case at bar. The total of all foreman positions and sales positions during the relevant time period (even using Bennett's charge as the basis for the class certification date) numbered only 34 according to plaintiffs' own evidence. Considering

plaintiffs' most liberal availability figures (approximately three to five times SMSA data), at the very most plaintiffs' evidence shows that six or seven positions would have been awarded to blacks during the relevant time frame.

Although the Court of Appeals below stated that its holding was not in conflict with its prior decision in Kelley v. Norfolk & Western Ry., 584 F.2d 34 (4th Cir. 1978), the very language quoted from Kelley by that Court indicates otherwise:

> Kelley establishes that there is no mechanical test for numerosity and the determination "turns on the nature of the claim of discrimination asserted by the plaintiffs and the number of persons who could have been injured by such discrimination."

743 F.2d at 217, quoting 584 F.2d at 35 (emphasis added). That the Court in Kelly saw the number of openings as equivalent to "the number of persons who could have been injured" is illustrated by the following:

> Moreover, in the relevant period, there were only 25 promotions to gang-leader or foreman. It could be argued persuasively that the appropriate class could not exceed 25 since that was the maximum number of promotion openings for which black car-repairmen could have competed. Perhaps an argument that the appropriate class should be confined to those eight the plaintiffs identify to have been qualified for consideration for promotion. It might be that under some theory, the appropriate class would embrace all the black car-repairmen, irrespective of qualification for promotion, though we have difficulty in finding a basis for such a result.

584 F.2d at 35. By the same analogy, the class in this case can consist of 34 persons at the very most. More realistically, numerosity exists only as to the six or seven positions which, by plaintiffs' evidence, is the outside limit on the number of positions that could have gone to blacks. In either event, numerosity does not exist.

If the date that Holsey, Drakeford and Frazier filed the charge of discrimination (March 7, 1974) is used as the basis for class certification as opposed to the date Bennett

filed her charge of discrimination (January 17, 1972), the absence of numerosity becomes even more apparent. Beginning with September 7, 1973 (six months before the date Holsey, Drakeford, and Frazier filed their charges of discrimination), the total of all foremen and sales positions was only 17. It is respectfully submitted that the Court of Appeals' ruling as to numerosity is in clear conflict with the holdings of this Court and other Circuits, and in effect would render subject to class treatment an isolated employment decision (e.g., promotion) simply because a large number of employees within the protected group were employed at the facility.

THE COURT OF APPEALS ERRED IN HOLDING THAT PLAINTIFFS' HARASSMENT AND RETALIATION CLAIMS WERE SUSCEPTIBLE TO CLASS TREATMENT.

The Court of Appeals rejected Armour's contention that the harassment and retaliation claims were too individualized to be

susceptible to class treatment. The Court recognized that these claims involved "individual factual questions," but held that Rule 23's commonality requirement was met because these claims involved "common questions of law." 743 F.2d at 217. It is clear, however, that because these claims are so individualized, the claims and defenses of the plaintiffs were not "typical of the claims or defenses of the class" as required by subsection (a)(3) of Rule 23. The Court of Appeals adopted a standard in conflict with that set forth by this Court in East Texas Motor Freight Systems, Inc. v. Rodriquez, 431 U.S. 395, 405-06 (1977), that all of the requirements of Rule 23 must be met.

The Fourth Circuit in this case has also clearly adopted a position contrary to that applied by the Seventh Circuit in Patterson v. General Motors Corporation, 631 F.2d 476 (7th Cir. 1980). There the Court examined plaintiff's allegations that the employer inter

alia maintained an essentially all-white department, failed to promote plaintiff, and harassed plaintiff for seeking redress of grievances by terminating him, forcing him to return prematurely from medical leave, and falsely accusing him of violation of work rules, id. at 479, and held that

> even if the plaintiff were to specify grievances of other members of the purported class, the acts for which plaintiff complains are not susceptible to class treatment."

Id. at 481 (emphasis added). As the Court went on to point out,

> A certifiable class claim must arise out of the same legal or remedial theory, see Donaldson, supra, 554 F.2d at 831, and grievances of other employees similar to those asserted by plaintiff would not meet that requirement.

Id. (emphasis added).

The claims of harassment and retaliation raised by plaintiffs in the case at bar are strikingly similar to those raised by plaintiff

in Patterson, especially with regard to their individualized nature. Plaintiffs here had different supervisors and complained of different types of harassment and retaliation. It seems clear the such claims were never intended to be covered under Rule 23, and the Fourth Circuit's treatment of the claims represents a serious departure from established class action procedures.

CONCLUSION

In light of the authorities cited above and argument contained herein, it is respectfully submitted that Armour's Petition for Writ of Certiorari should be granted.

WHEREFORE, your petitioner Armour and Company, through its undersigned counsel, hereby petitions that a Writ of Certiorari issue.

This the 10th day of January, 1985.

W. R. Loftis, Jr.

Penni L. Pearson

OF COUNSEL:

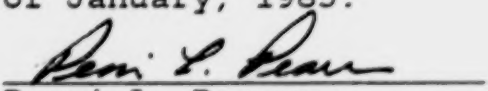
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CERTIFICATE OF SERVICE

I, Penni L. Pearson, hereby certify that on this date, I served copy of the foregoing Petition for Writ of Certiorari upon counsel of record for Petitioner by depositing copy thereof in the United States mail in Winston-Salem, North Carolina, postage prepaid, and addressed as follows:

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This the 14th day of January, 1985.



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